IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 697

OSCAR L. GRANT, et al.,

Petitioners,

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, and

DANIEL J. CAREY, Commissioner of Agriculture and Markets of the State of New York, Intervenor, and

ADAMS PRODUCERS COOPERATIVE, INC., et al., Intervenors, and

METROPOLITAN COOPERATIVE MILK PRODUCERS BARGAINING AGENCY, INC., and MUTUAL FEDERATION OF INDEPENDENT COOPERATIVES, INC., Intervenors,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its Order of April 9, 1956 denying the Petition for Writ of Certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit as prayed for in the Petition filed herein February 15, 1956.

Reasons for Granting Rehearing

I

Counsel for petitioners, while previously [1] noting that the decision below is precedent for the adoption of similar provisions in other milk marketing orders throughout the United States, did not call the attention of this Court to the fact that any such other provisions can only be attacked in the District of Columbia Circuit. The improbability of litigation elsewhere with a resulting conflict of decision, has been ground for granting a Petition for Rehearing; *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50.

In the instant case, any challenge of a similar provision in any other order must be brought in the District of Columbia, where service is obtained upon the Secretary. Such challenge must be by injunction procedure, since only producers have standing to raise the issue, and no statutory review is provided for them (*Stark* v. *Wickard*, 321 U. S. 288). Although handlers are afforded a statutory review in their own districts [7 U. S. C. Sec. 615(b)] they have no legal standing to test the issue in this case (*United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 561, followed in *Stark* v. *Wickard, supra*, at 308). Therefore, any action to challenge "cooperative payments" in any order must be brought by producers, by process served upon the Secretary of Agriculture in the District of Columbia; *Massachusetts Farmers Defense Committee* v. *United States*, 26 F. Supp. 941; followed in *C. J. Wicland & Son Dairy Products Co.* v. *Wickard*, 4 F. R. D. 250, 254. The Secretary of Agriculture has successfully resisted the efforts of producers to restrain enforcement of milk marketing orders elsewhere than in the District of Columbia; because the local Market Administrator "has no power to enforce the provisions of such order(s)," *Gudgel* v. *Iverson*, 87 F. Supp. 834.

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[1] Petition, p. 16; Reply to Briefs in Opposition, p. 9.

This is the first case in which any court has sustained a "cooperative payment" provision under the Act of 1937. Therefore, if it does not conflict with *Stark*, it is of sufficient national importance to warrant review by this Court at this time, inasmuch as the question will never arise in any other circuit. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50.

II

The minority farm groups of the world's greatest milkshed (and the record shows without dispute that some of the petitioners hold membership therein) are doomed to extinction by the decision of the court below, which will henceforth be the law of the land. Dairy farmers cannot long be expected to continue as dues-paying members of the farm organizations of their choice, if compelled instead to pay dues [2] (i.e., the challenged deductions from their milk price) to the favored cooperatives.[3]

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[2] The record is replete with evidence by the proponents of the challenged payments, that the deductions therefor from nonmembers are analogous to the dues paid to cooperatives by members; the amount of the challenged payments was based in part on evidence of the amount paid as dues by cooperative members: Vol. II, Jt. App. 575-576, for example.

[3] Incidentally, there is no finding that "qualified" cooperative associations require the challenged payments in order to sustain their membership. Although the Secretary found that producers of the New York Milkshed "tended to withdraw support from the cooperative associations" (Vol. I, Jt. App. 112), this can only be material if related to the challenged provisions, i.e., if the Secretary also made a finding that such cooperative associations were "qualified" cooperatives, i.e., those engaged in "qualifying" activities or services. But no such finding appears: The small membership decline from 73.9% to 70.4%, upon which the foregoing quotation is based (Vol. I, Jt. App. 112), is for "Total Cooperatives" in the tabulation (Vol. I, Jt. App. 113); this shows 91 on June 1, 1952, but the findings also show that there were only 73 "qualified" cooperatives in June 1952 (*id.*, p. 112). There is no finding and no evidence that the small decline in membership is in the *qualified* cooperatives; and, of course, there is no finding that there was not a similar small decline in membership in cooperatives of other milk markets.

When Congress intended to authorize a requirement of such payments by non-members (employees) to organizations (certain labor unions) which they do not wish to join, it knew exactly the language to use: see Labor Management Relations Act of 1947, 29 U. S. C., Appendix, Sec. 158(a) (3); and see Railway Labor Act, 45 U. S. C. Sec. 152, Par. Eleventh (a). The vast difference between such expression of Congressional policy, and the "auxiliary" clause of Sec. 8c(7)(D) of the Act of 1937, is obvious. However, another point should be noted: The Congress had explicitly designated such labor unions as the exclusive representative of all employees; 29 U. S. C. Appendix Sec. 159(a); 45 U. S. C. Sec. 152, Par. Ninth. But in the Act of 1937, 7 U. S. C. Sec. 608c(12), Congress limited milk cooperative associations to representation only of "members of, stockholders in, or [producers] under contract with" such associations, while taking full cognizance (in the same subsection) that such associations may engage in "advancing the interests of the producers of such commodity." Notwithstanding this express Congressional limitation, the Secretary has patently based the challenged provisions upon his desire to rewrite the Act of 1937, to make certain cooperatives the exclusive [4] representatives of all milk producers and thereby overrule simultaneous [5] Congressional refusal to apply its labor policy to its farm policy: "Active participation by producers in the regulation of milk marketing is feasible only by means of cooperative associations of producers" (Findings, Vol. I, Jt. App. 112).

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[4] Since adoption of the 1953 Amendment, the Secretary even limits his conferences with New York farm groups to the 4 "qualified" associations *only;* see Secretary's Press Release dated April 9, 1956, USDA No. 989-56. This, notwithstanding that different views may be, and often are, held by other groups, including those of which some petitioners are members.

[5] The "auxiliary" powers clause of Sec. 8c(7)(D) AND Sec. 8c(12) WERE originally enacted August 24, 1935, Public No. 320, 49 Stat. 750. The very same Congress approved the National Labor Relations Act, 29 U. S. C. Sec. 159(a), effective July 5, 1935.

And the Secretary effectuated his desire to silence others by compelling the financial support of members of other farm groups to go instead to organizations of the Secretary's choice, through the challenged deduction for payments to the latter.

In Sec. 8c(12) of the Act of 1937 [7 U. S. C. Sec. 608c(12)], Congress itself, although expressing full cognizance that cooperatives may be engaged in "advancing the interests of the producers of such commodity," nevertheless (a) limited their representation [6] to members, stockholders and contract-patrons; and (b) did not include any price adjustments or deductions in their favor when enumerating provisions for price adjustments and deductions: Sec. 8c(5)(A) and (B). On the contrary, the Congress specified in Sec. 8c(5)(E) that deductions only for certain services could be made, and made "*except* as to producers for whom such services are being rendered by a cooperative marketing association."

We submit that the silencing of minority groups (by authorizing compulsory diversion of their financial support) was not intended by Congress here; because this is a matter of legislative rather than administrative policy, which Congress spelled out on the two occasions (above noted) when it intended to make such drastic change in the common law, while indicating to the contrary in the Act of 1937.

III

On the scope of judicial review under the Agricultural Marketing Agreement Act of 1937, we now have a conflict among the circuits: The court below held that the Secretary's conclusions that his order is "reasonably necessary to accomplish the purposes of the statute" are final when

[6] It was the unit or "collective ballot," authorized by subsection 8c(12), which permitted cooperative management to vote these payments to themselves (Vol. II, Jt. App. 448).

supported by evidence (Appendix, p. 34). But in the Second Circuit (the "home" circuit of Order No. 27, in which this question cannot arise, as shown in Part I of this petition) it is held that the Secretary's conclusions upon the effect and meaning of Order No. 27 are not final, irrespective of evidence sufficient to support the order as written: *Crowley's Milk Co.* v. *Brannan*, 198 F. (2d) 861 (C. A. 2d), at 864.[7] Certainly the Secretary's findings and conclusions should be accorded no greater finality with respect to the meaning and purposes of the Act, than with respect to the meaning and purpose of his own regulations.

Petitioners pray that a rehearing be granted.

Respectfully submitted,

HARRY POLIKOFF,
30 Pine Street,
New York 5, N. Y.,
Counsel for Petitioners.

WILLIS F. DANIELS,
Commerce Building,
Harrisburg, Pa.,
of Counsel for Petitioners.

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[7] See also *Barron Corp. Creamery* v. *Wickard*, 140 F. (2d) 485 (C. A. 7th). It was noted, *per* Minton, J., that the record lacked evidence of "fairness" on the matter specifically committed to the Secretary's discretion, i.e., "classifying milk in accordance with the form in which or the purpose for which it is used." Sec. 8c(5)(A). But in the instant case the mandate of the Act, Sec. 8c(5)(B), is "for the payment to all producers and associations of producers * * * of *uniform prices*," subject *"only"* to the specified deductions or adjustments, leaving no discretion for the Secretary to consider arguments or evidence of the fairness [or necessity] of any other deduction or adjustment; because this would violate the "not inconsistent" limitation of Sec. 8c(7)(D). Such arguments "might very properly be made to a Congressional committee," as noted by Minton, J. in 140 F. (2d) at 487. In any event, it is undisputed that the 1938 provision of Order No. 27 contains no findings as to fairness or necessity; Petition, p. 9.

Certificate of Counsel

I hereby certify that the foregoing g petition for rehearing is presented in good faith and not t for delay, and is restricted to grounds specified in Rule e 58 of the rules of this Court.

Counse HARRY POLIKOFF sel for Petitioners.